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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ANTONIO MARENO,

Petitioner,

vs.

COUNTY OF WESTCHESTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT COUNTY OF WESTCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit properly affirmed the United States District Court for the Southern District's order granting summary judgment in favor of the County of Westchester in dismissing the age discrimination complaint of Petitioner Mareno on the basis that a party opposing a properly supported motion for summary judgment cannot defeat said motion with unsupported allegations?

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CITATIONS OF OPINIONS BELOW

Respondent accepts the Petitioner's citation of the opinions below which are reproduced in the Appendix to the Petition for Certiorari.

STATEMENT OF THE CASE

On or about early April, 1989, the Westchester County Attorney, the statutory attorney for civil matters involving the County of Westchester, New York, advertised in the New York Law Journal for the position of Assistant County Attorney*. On or about early April, 1989, Antonio Mareno submitted his resume to the Westchester County Attorney in response to the aforementioned advertisement (A31). See Collective Exhibit 1, after A44).

In a letter dated April 12, 1989, the Westchester County Attorney responded to Mr. Mareno's letter and resume by advising Mr. Mareno that Westchester County was unable to interview all

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*Numbers in parentheses is preceded by the letter "A" refers to the pages in the Joint Appendix filed by Petitioner in the Second Circuit.

applicants for the position, that Westchester County would be unable to interview him for the position and by thanking him for responding to the April, 1989 advertisement (Collective Exhibit 2).

Based on the aforementioned facts, Mr. Mareno filed charges with the United States Equal Employment Opportunity Commission (hereinafter "EEOC") alleging that the County's failure to hire him was an indication of age discrimination (Collective Exhibit B, annexed immediately thereafter). In a letter addressed to Mr. Mareno, the EEOC found the evidence did not show the County discriminated against individuals because of their age or that Mr. Mareno was not hired because of his age. Therefore, the Commission dismissed and terminated its administrative proceeding regarding this charge. (Exhibit C of Respondent's

motion for summary judgment introduced at A5).

In a letter entitled "Determination on Review and Dismissal of ADEA charge," dated February 28, 1991, the EEOC notified Antonio Mareno of his right to sue under the Age Discrimination in Employment Act, Title 29, United States Code, Section 621 et seq. (hereinafter "ADEA") within two years of the occurrence of the alleged discriminatory act (Exhibit 7 of Petitioner's affidavit of opposition introduced at A29).

On or about April 12, 1991, Antonio Mareno filed a summons and complaint in the United States District Court for the Southern District of New York (Exhibit A & B of the County of Westchester's motion for summary judgment introduced at A5). On or about April 19, 1991, Mr. Mareno served Westchester County with a summons

and complaint which alleged, inter alia, that the County of Westchester discriminated against him on the basis of age by not interviewing him for the position of Assistant County Attorney.

On or about May 9, 1991, the County of Westchester moved to dismiss the complaint of Antonio Mareno pursuant to the Federal Rules of Civil Procedure §12(b)(6), or in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure based upon the argument that an Assistant County Attorney was not a position covered by the ADEA (p. 2 of District Court's proceeding log). Antonio Mareno opposed the aforementioned motion by the County of Westchester (p. 2 of District Court's proceeding log). The District Court denied the County's motion to dismiss.

On or about November 22, 1991, the County of Westchester answered Antonio Mareno's complaint (Exhibit D of County of Westchester's motion for summary judgment introduced at A5). The answer raised various defenses, including but not limited to, Mr. Mareno's failure to state a claim upon which relief could be granted. Thereafter, depositions took place in this matter.

On or about February 1, 1993, the County of Westchester moved the United States District Court for the Southern District for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment against Antonio Mareno in favor of the County of Westchester (A5). On or about February 26, 1993, Antonio Mareno opposed the motion for summary judgment made by the County of Westchester (A29).

The Decision Of The Lower Court

By written memorandum order entered June 10, 1993, the United States District Court for the Southern District of New York (BRODERICK, J.) granted the County of Westchester's motion for summary judgment based upon a lack of evidence to support the claims made by Antonio Mareno and, therefore, dismissed the complaint. 826 F.Supp. 710 (S.D.N.Y. 1993).

In so ruling, the District Court noted that the EEOC conducted an investigation of Mareno's complaint and filed a report. 826 F.Supp. at 711. The EEOC found, according to the District Court, that during the relevant time frame the County Law Department "hired many attorneys over forty years of age." Moreover, the Court pointed out these attorneys hired past age forty were still

employed by the County Law Department. Indeed, one attorney was hired at the age of fifty-nine (59). Id.

The District Court also stated that the EEOC further found that at the time Antonio Mareno's complaint was brought, approximately 27% of the County Law Department employees were over forty years of age. Id.

Accordingly, the District Court held that Antonio Mareno's claims were implausible and unsupported and dismissed the action based upon the legal precepts set forth in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Id.

It is from this Judgment that Antonio Mareno filed a Notice of Appeal, on July 7, 1993, with the United States Court of Appeals, Second Circuit.

Decision of the Second Circuit

The United States Court of Appeals for the Second Circuit, in a unanimous unpublished judgment entered on December 3, 1993, affirmed the United States District Court's Memorandum Order for the reasons substantially set forth in Judge Broderick's Memorandum Order, namely, a party opposing a properly supported motion for summary judgment cannot defeat the motion with unsupported allegations. 17 F.3d 390 (2d Cir. 1993).

On February 2, 1994, Antonio Mareno's petition for rehearing with a suggestion for rehearing, in banc, was denied.

SUMMARY OF ARGUMENT

This case is not of special importance and the Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits.

This Court's ruling in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), [see also e.g. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) mot den, 480 U.S. 903 (1987)] has made it clear that when the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a

whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

As the lower Courts here held in finding Petitioner's allegations 'implausible' and "unsupported", and as the record below plainly demonstates, summary judgment was properly granted since Petitioner Antonio Mareno has failed to set forth legally sufficient evidence to support his alleged claim of age discrimination.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review

Notwithstanding his patent failure to present a scintilla of evidence in support of his allegations, Petitioner, nonetheless, asserts, that the lower Courts erroneously rejected his claim that since he did not receive a job interview for the position of Assistant Westchester County Attorney, the County of Westchester discriminated against him because of age in violation of 29 U.S.C. §621 et seq, the Age Discrimination in Employment Act (ADEA).

This Court, however, has never regarded its function as simply correcting a legal error perceived by a

disappointed litigant in a lower Court decision. To the extent Petitioner seeks redress against the administrative operations of the Equal Employment Opportunity Commission, that role is best left to Congress.

Consistent with this Court's holding Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court of Appeals for the Second Circuit, affirmed the ruling of the District Court for the Southern District of New York, the trier of fact, which properly determined that Petitioner's claims were totally devoid of any evidence necessary to support a jury verdict in his favor. The Second Circuit also drew upon its previous opinion in SEC v. Research Automation Corp., 585 F.2d 31,33 (2d Cir. 1978) in support of its analysis.

Pursuant to the ADEA, it is unlawful for an employer "to fail to refuse to hire...any individual or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). In order for an individual to establish a prima facie case of age discrimination, Petitioner must first identify a specific employment practice having an adverse impact upon a member of the protected class, and then show causation that the practice excluded him from a job, as a member of a protected group. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983).

More specifically, in order to establish a claim based upon age discrimination, Petitioner must show (1)

he is in the protected class between the age of 40-70; (2) the defendant County of Westchester took action which adversely affected Petitioner's employment situation; (3) that Petitioner was qualified for the position for which he applied; (4) that Petitioner sought someone else with similar qualifications to perform the work; and (5) that the Petitioner was not treated age neutrally. Mc Donnell Douglas Corp. v. Green, 411 U.S. 792 (1973); See generally St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993); Hollander v. American Cyanamid Co., 895 F.2d 80 (2d Cir. 1990).

However, herein, Petitioner has failed to provide or set forth any facts which supports his claim that the County discriminated against him on the basis of his age in violation of 29 U.S.C.

§626(a). Although Petitioner can show he is within the protected class, this fact alone is insufficient to maintain a lawsuit. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 83 (2d Cir. 1983). In order to prove age discrimination, age must be shown to be the determinative factor. Hagelthorn v. Kennecott Corp., 710 F.2d at 83. Antonio Mareno has made no such offering but instead has merely offered self-serving conjecture.

Petitioner has not established nor offered any substantiation demonstrating that he was not interviewed due to his age. To the contrary, Petitioner has filed this lawsuit to "see what will develop" (Exhibit E, p. 154 of Respondent's motion for summary judgment). Further, Petitioner has freely admitted that had he received no response at all or a different letter,

there would be no discrimination against him by the County (Exhibit E, pp. 118-121 of Respondent's motion for summary judgment). Petitioner's sensitivity to a letter which does not conform to his liking cannot support a claim based on age discrimination.

The lower Courts properly dismissed the complaint of Petitioner since his speculations are insufficient to support a claim based upon age discrimination. In granting summary judgment, the District Court specifically found Petitioner's claim "'implausible'"... [citation omitted] and "unsupported," Mareno v. County of Westchester, 826 F.Supp. at 711 and the Second Circuit implicitly adopted such finding in its judgment.

B. There is no conflict among the Circuits

There is no conflict among the Second Circuit or other Circuits, on the issue Petitioner purportedly attempts to raise concerning "controlling precedents" governing his unsubstantiated ADEA allegation.

Petitioner cites a prior decision of the Second Circuit, Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) cert den, Markham v. Geller, 451 U.S. 945 (1981) and a decision of the Third Circuit, EEOC v. County of Allegheny, 705 F.2d 679 (3d Cir. 1983) to somehow intimate a purported conflict among the Circuits, justifying a grant of certiorari. The purported conflict is plainly illusory.

Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) cert den, Markham v. Geller, 451 U.S. 945 (1981), involved a 55 year

old teacher who was hired and then replaced by a 25 year old teacher. This case does not support the contentions of Petitioner for a number of reasons nor does it represent the facts at bar.

In Geller, the Board of Education had a policy which favored younger employees. At bar, Petitioner could not substantiate any of his claims let alone show the County of Westchester had such a policy, since such a policy does not exist. Moreover, in the EEOC letter to Petitioner Mareno, it is stated that the County of Westchester Law Department, in fact, hired many older attorneys and that they still were employed there. Further, unlike Geller, other than making bald assertions, Petitioner has not shown any facts which would show that the County of Westchester Law Department hires only young attorneys as

a money saving scheme.

As the Second Circuit stated in Geller, supra, a prima facie case of discriminatory impact may be established in actions instituted under the ADEA by showing that an employer's facially neutral practice has a disparate impact upon members of plaintiff's class. The District Court and the Second Circuit properly found Petitioner Mareno failed to do. Petitioner Mareno has utterly failed to present any evidence which would show that his age was a causative or determinative factor, i.e., one that made a difference in whether the County of Westchester decided to hire him.

Similarly, the case of EEOC v. County of Allegheny, 705 F.2d 679 (3d Cir. 1983), does not support Petitioner Mareno's contentions. This case involved a County that had a rule that

no one over the age of 35 could take their police exam. Here, Petitioner has made no showing that the County of Westchester had a hiring policy based upon age.

Under the circumstances, other than Petitioner's own baseless and self-serving musing, Petitioner has clearly failed to provide any basis to support his allegations that he was denied an interview because of his age.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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